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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHNNY BAKER II,

Defendant and Appellant.

E070825

(Super.Ct.No. RIF1506343)

OPINION

APPEAL from the Superior Court of Riverside County. Steven G. Counelis,  
Judge. Reversed with directions.

Stephen M. Lathrop, under appointment by the Court of Appeal, for Defendant  
and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney  
General, Julie L. Garland, Assistant Attorney General, and Robin Urbanski and Brendon  
W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant, Johnny Baker II, of attempted willful, deliberate, and premediated murder (Pen. Code, §§ 664, 187, subd. (a); count 1)<sup>1</sup> and possession of a firearm by a prohibited person (§ 29800, subd. (a); count 2). The jury additionally found true allegations defendant personally and intentionally discharged a firearm (§§ 12022.53, subd. (c), 1192.7, subd. (c)), personally and intentionally discharged a firearm causing great bodily injury (§§ 12022.53, subd. (d), 1192.7, subd. (c)(8)), and personally inflicted great bodily injury (§§ 12022.7, subd. (a), 1192.7, subd. (c)(8)) in his commission of the count 1 offense. The court thereafter found true allegations defendant had suffered two prior prison terms (§ 667.5, subd. (b)), one prior prison term for a violent felony conviction (§ 667.5, subd. (a)), and two prior strike convictions (§§ 667, subds. (c), (e)(2)(A), 1170.12, subd. (c)(2)). The court sentenced defendant to an aggregate sentence of imprisonment of 82 years to life.

On appeal, defendant contends the court erred in imposing a three strikes sentence on the count 2 offense because the People failed to plead and prove that it was a serious or violent felony. The People concede the issue. Defendant further argues the court erred in staying, rather than striking, the prior prison term enhancements. The People concede the issue. Finally, defendant maintains the abstract of judgment must be corrected to accurately reflect the jury convicted defendant of unlawful possession of a firearm in count 2, not the alternative ground of firearm possession while addicted to narcotics. The People concede this matter as well. We agree.

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<sup>1</sup> All further statutory references are to the Penal Code.

## I. FACTS<sup>2</sup>

Defendant and the victim rode in the back seat of a vehicle driven by B.P. Defendant began questioning the victim about the NAW gang because his son had been involved in an incident with the gang. Defendant became angry with the victim and began punching and kicking her. Defendant opened the passenger side door and pushed the victim out of the vehicle as he shot her twice. The victim sustained two gunshot wounds to her head, which caused her to suffer from a speech impediment and partial paralysis for which she underwent a series of surgeries.

## II. DISCUSSION

### A. *Count 2 Sentencing*

Defendant contends the court erred in imposing a three strikes sentence on the count 2 offense because the People failed to plead and prove that the count 2 offense was a serious or violent felony. The People concede the issue. We agree.

On the count 2 offense, the court imposed an aggregate sentence of 30 years to life consecutive to the sentence on count 1 consisting of the following sentence: 25 years to life, plus two years consecutive for the attached prior prison term enhancements, plus three years consecutive on the prior prison term for a violent felony enhancement. The court then stayed imposition of punishment on all the prior prison term enhancements attached to count 2.

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<sup>2</sup> The facts of the offenses for which the jury convicted defendant are largely irrelevant to the issues raised on appeal; thus, we shall provide only an abbreviated summary of the behavior underlying the convictions.

“Under the Three Strikes law as originally enacted, a felony defendant who had been convicted of a single prior serious or violent felony (a second strike defendant) was to be sentenced to a term equal to “twice the term otherwise provided as punishment for the current felony conviction.” [Citation.] By contrast, a defendant who had been convicted of two or more prior serious or violent felonies (a third strike defendant) was to be sentenced to “an indeterminate term of life imprisonment with a minimum term of” at least 25 years. [Citation.]’ [Citation.] Thus, under the original law, a defendant previously convicted of two qualifying strikes was subject to a life term if he was subsequently convicted of *any* new felony, regardless of whether it was a serious or violent one.” (*People v. Frierson* (2017) 4 Cal.5th 225, 230.)

“On November 6, 2012, the voters approved Proposition 36, the Three Strikes Reform Act of 2012 (Reform Act), which amended Penal Code sections 667 and 1170.12 and added section 1170.126. [Citation.]” (*People v. White* (2014) 223 Cal.App.4th 512, 517, fn. omitted.) “Now, under the *prospective* provisions of the Reform Act (set forth in §§ 667, 1170.12), a defendant convicted of two prior serious or violent felonies is subject to the 25-year-to-life sentence only if the current third felony is a *serious or violent* felony. [Citation.]” (*Ibid.*) “Thus, if the third felony is not a serious or violent felony . . . the defendant will be sentenced as a second strike offender.” (*Ibid.*)

The People failed to plead or prove that defendant’s count 2 offense was either violent or serious. Moreover, the People could not have legally done so as defendant’s count 2 offense is not statutorily designated as a violent or serious felony. (§§ 1170.12,

(b)(1), 667.5, subd. (c)(1), 1192.7, subd. (c)(1).) Thus, the matter should be remanded to the trial court for resentencing.

*B. The Section 667.5, Subdivision (b) Enhancements*

Defendant contends the court erred in staying, rather than striking, the prior prison term enhancements. The People concede the issue. We agree.

“Once the prior prison term is found true within the meaning of section 667.5[, subdivision] (b), the trial court may not stay the one-year enhancement, which is mandatory unless stricken. [Citations.]” (*People v. Langston* (2004) 33 Cal.4th 1237, 1241.) An “order staying imposition of the prior prison term enhancement is an unauthorized sentence and is subject to correction on appeal. [Citation.]” (*People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521.) Thus, we shall remand the matter for resentencing. (*People v. Chavez* (2012) 205 Cal.App.4th 1274, 1276; *People v. Buycks* (2018) 5 Cal.5th 857, 893 [“[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.’”].)

*C. Abstract of Judgment*

Defendant maintains the abstract of judgment must be corrected to accurately reflect the jury convicted defendant of unlawful possession of a firearm in count 2, not the alternative ground of firearm possession while addicted to narcotics. The People concede the issue. We agree.

“It is well settled that ‘[a]n abstract of judgment is not the judgment of conviction; it does not control if different from the trial court’s oral judgment and may not add to or modify the judgment it purports to digest or summarize. [Citation.]’ [Citation.] When an abstract of judgment does not reflect the actual sentence imposed in the trial judge’s verbal pronouncement, [appellate courts have] the inherent power to correct such clerical error on appeal, whether on our own motion or upon application of the parties. [Citation.]” (*People v. Jones* (2012) 54 Cal.4th 1, 89.)

Here, the abstract of judgment reflects that the jury convicted defendant of “felon and narcotic” in the count 2 offense. However, the jury actually convicted defendant of “possession of firearm by person prohibited due to conviction . . . .” Thus, the abstract of judgment must be corrected to accurately reflect the judgment. The abstract of judgment will need to be amended to reflect the court’s resentencing on remand regardless.

### III. DISPOSITION

The judgment is reversed and the matter is remanded for resentencing in accordance with the views expressed herein. (*People v. Buycks, supra*, 5 Cal.5th at p. 893 [“[W]hen part of a sentence is stricken on review, on remand for resentencing ‘a full resentencing as to all counts is appropriate, so the trial court can exercise its sentencing discretion in light of the changed circumstances.’”].) The trial court is further directed to correct the abstract of judgment to reflect the jury convicted defendant of “possession of a firearm by a person prohibited due to a conviction” in the count 2 offense. Finally, the trial court is directed to forward a copy of the new abstract of judgment and sentencing

minute order to the Department of Corrections and Rehabilitation. In all other respects,  
the judgment is affirmed.

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MCKINSTER

Acting P. J.

We concur:

FIELDS

J.

RAPHAEL

J.